STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
(Cooper, Fort Hood and R.S. Gribbs, JJ.)

JAMES D. AZZAR,

Plaintiff-Appellant, and

PROCESSING SOLUTIONS, LIMITED,

Plaintiff,

v.

THE CITY OF GRAND RAPIDS,

Defendant-Appellee, and

BERNARD C. SCHAEFER, and
ROBERT J. KRUIS,

Defendants.

---/

Supreme Court Docket No. 130310

Michigan Court of Appeals No. 260438

Kent County Case No. 03-11760-NZ

DEFENDANT-APPELLEE'S

BRIEF ON APPEAL

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STATEMENT REGARDING JURISDICTION

Defendant-Appellee City of Grand Rapids accepts the jurisdictional statement set out in Plaintiff-Appellant's Brief on Appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Is the City of Grand Rapids Building Maintenance Code preempted by the Stille-DeRossett-Hale Single State Construction Code Act, MCL 125.1501, *et seq.*, as amended by Public Acts 1999, No. 245?

Plaintiff-Appellant answers: YES

Defendant-Appellee answers: NO

Circuit Court answered: NO

Michigan Court of Appeals answered: NO

COUNTER-STATEMENT OF FACTS

I. Introduction

In all of the briefs filed in this matter, Plaintiff-Appellant has set out essentially the same statement of facts. Many of the recitations in Plaintiff's statement of facts continue to be largely irrelevant to the question Defendant-Appellee has viewed as central to the issue before the various courts. This Court has clearly identified the central issue, and has focused the question to be briefed as whether the City of Grand Rapids Building Maintenance Code is preempted by the Stille-DeRossett-Hale Single State Construction Code Act, MCL 125.1505 *et seq.*, as amended by Public Acts 1999, No. 245.

II. Character Of The Pleadings And Proceedings

Plaintiff's complaint is premised on federal statutes (42 USC § 1983 and 42 USC § 1988) which protect against alleged civil rights violations which occur under color of law.[1] Plaintiff's lengthy complaint sets out claims for:

> Count I, Illegal promulgation and enforcement of Building Maintenance Code from 1987 to July 13, 2001. (42 USC § 1983)
>
> Count II, Illegal enforcement of Building Maintenance Code after 1999 amendments to State Construction Code Act. (42 USC § 1983)
>
> Count III, Historic Preservation Ordinance illegally provides for criminal penalties. (42 USC § 1983)
>
> Count IV, Improper warrant and illegal search, lack of probable cause and misrepresentation to the Court. (42 USC § 1983)

[1] Plaintiff first initiated this suit for claimed civil rights violations in the U.S. Federal District Court, W.D. Michigan (*James D. Azzar and Processing Solutions, Limited v City of Grand Rapids, Bernard C. Schaefer and Robert J. Kruis*, Case No. 1:03-CV-0500) (Honorable David W. McKeague). This federal action was dismissed by voluntary stipulation approximately four months after it was filed. Plaintiff refiled his federal civil rights claim in the state court soon after the federal action was dismissed. Plaintiff's state complaint, but for an added malicious prosecution count, essentially mirrors and duplicates the federal complaint filed. (Appendix 191a through 248a)

Count V, Improper warrant and illegal search, lack of authority to inspect or request such inspection. (42 USC § 1983)

Count VI, Declaratory judgment and injunctive relief regarding Building Maintenance Code. (State Claim)

Count VII, Declaratory judgment and injunctive relief regarding Historic Preservation Ordinance. (State Claim)

Count VIII, Malicious prosecution. (State Claim)

Plaintiff's prayer for damages as set out in his complaint asks for reimbursement for substantial attorney fees incurred, damages for humiliation, emotional and mental distress, an award of punitive damages to punish the City of Grand Rapids for its allegedly callous or reckless conduct, an award of exemplary damages, and also an award of attorney fees as permitted under 42 USC § 1988.

Plaintiff filed a motion for summary disposition on his claims for illegal enforcement of the Grand Rapids Building Maintenance Code (Count I and Count II of his complaint) which was argued before Kent County Circuit Judge, the Honorable Paul J. Sullivan, on May 24, 2004. Judge Sullivan suggested that the parties engage in facilitative mediation. Thereafter, facilitative mediation resulted in a compromise which narrowed the issue to one of express preemption as argued before Judge Sullivan. Counts III through VIII of Plaintiff's complaint were dismissed, including the allegations of civil rights violations against individual City employees. In exchange for that dismissal, two proposed judgments were presented to the circuit court, in anticipation of Judge Sullivan's ruling on Plaintiff's summary disposition motion. One judgment would be entered if Plaintiff-Appellant was successful, the other judgment would be entered if Defendant-Appellee was successful.

Judge Sullivan denied Plaintiff's motion for summary disposition based on arguments of express preemption. Judge Sullivan ruled that the Stille-DeRossett-Hale

Single State Construction Code Act (hereinafter "the Act") preempts "local regulations in matters relating to construction." However, the circuit court ruled that "local building maintenance codes," including the Grand Rapids Building Maintenance Code, are not expressly preempted, for the reasons set forth by 61st District Judge Jeanine LaVille in an earlier and unrelated 61st judicial district court case which dealt with the identical legal issue. Judge Sullivan went on to state as follows:

> There is no dispute that pursuant to the Single State Construction Code Act, MCL 125.1501, *et seq.*, state law preempts local regulation in matters relating to construction. The issue in dispute relates to whether local building maintenance codes, such as the Grand Rapids Building Maintenance Code, are included in the preemption. This issue was specifically and directly addressed by 61st District Judge Jeanine Nemesi LaVille in the case of *City of Grand Rapids v Abney,* 61st District Court No. 02-0M-1840. In a well written and well reasoned opinion dated December 15, 2003, Judge LaVille specifically held that the Grand Rapids Building Maintenance Code was not preempted by state law.
>
> This Court fully recognizes that the cited district court opinion is in no way binding or precedential with respect to this court's consideration of the preemption issue. On the other hand, neither is there a reason here to reinvent the wheel . . . [H]er excellent "Corrected Opinion" dated December 15, 2003 is adopted by this court as its own. The LaVille opinion accordingly is attached hereto and incorporated herein as the opinion of this court on the issue of preemption. (Appendix 293a and 294a)

In *Grand Rapids v Abney,* Judge LaVille concluded that any local code "regulating the subject matter of" the six individual codes which comprise the state construction code are expressly preempted. However, the district court ruled that the City's Building Maintenance Code is not expressly preempted, given the language of Section 102.2 of the Michigan Building Code. In summary, the district court held that the "express preemption of the state act is limited to the subject matter of the six codes listed therein," and that express preemption does not extend to the International Property Maintenance Code ("IPMC") as it was not specifically referenced in the state statute. Judge LaVille's opinion reasons as follows:

In this case, the defendant [William C. Abney] argues that the Michigan Single State Construction Act, MCL 125.1501 *et seq.*, ["the state act" herein] preempts the city Building Maintenance Code. As of July 1, 2002 that act repealed the statute permitting a local unit of government to enforce its own construction code. After that date, the state act provides that "This act and the code apply throughout the state." MCL 125.1508a(1). The Act further provides:

. . . the code shall consist of the international **residential code**, the international **building code**, the international **mechanical code**, the international **plumbing code** published by the international code council, the national **electrical code** published by the national fire prevention association, and the Michigan uniform energy code with amendments, additions, or deletions as the director deems appropriate. MCL 125.1504(2). [Emphasis added.]

Any local codes regulating the subject matter of the six codes cited in the above provision are thus expressly preempted.

* * *

The defense notes that the international building code, cited in the above provision and re-codified as the Michigan Building Code, incorporates by reference the International Property Maintenance Code. Because the International Property Maintenance Code regulates the same subject matter as the city Building Maintenance Code, the defense argues that the city Building Maintenance Code is preempted as well. However, section 102.2 of the Michigan Building Code provides that:

> The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law.

Thus, although the Michigan Building Code incorporates the International Property Maintenance Code, it does with the provision that local law is not preempted. The express preemption of the state act is limited to the subject matter of the six codes listed therein. Therefore, I find no express preemption of the city Building Maintenance Code. (Appendix 297a and 298a)[2]

[Internal footnote omitted, emphasis original to Judge LaVille.]

[2] The Court should note that Plaintiff, through his counsel in this appeal, intervened in the *City of Grand Rapids v Abney* and presented all the arguments incorporated in his brief to this Court to 61st District Court Judge Jeanine LaVille.

On appeal, the Court of Appeals did not address whether the Act or the state construction code preempted a City from enacting local building codes, or "local regulation in matters relating to construction" as it was phrased by the circuit court. The Court of Appeals addressed only the narrow question, whether the City's Building Maintenance Code was preempted. The Court of Appeals held that the City's Building Maintenance Code was not preempted, on the grounds that neither MCL 125.1504 nor MCL 125.1508a "contains a statement of express preemption" regarding local building maintenance codes.

In its September 22, 2005 opinion, the Court of Appeals set out the following general test regarding express preemption: "[p]reemption by state law is concerned with … whether . . . the ordinance directly conflicts with the state statute." *Azzar, et al. v Grand Rapids, et al.*, 2005 Mich App LEXIS 2299, *3 (unpublished opinion of the Michigan Court of Appeals, Docket No. 260438, issued September 22, 2005), citing *Rental Property Owners Assoc. v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). According to the Court of Appeals, express preemption "occurs when the ordinance permits what the statute prohibits or visa versa." *Id*., citing *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977).

Examining the statute after the 1999 amendments, the Court of Appeals held:

> We similarly reject plaintiffs' claim that the BMC was preempted pursuant to certain statutory amendments to the Construction Act in effect on July 31, 2001. Neither MCL 125.1504, as amended by 1999 PA 245 to specify particular model codes to be made part of the state construction code, nor MCL 125.1508a, as added by 1999 PA 245 to apply the state construction code without exemption, contains a statement of express preemption.
>
> [*Azzar*, *supra* at *8.]

III. Material Events.

Plaintiff Azzar purchased a historically designated fire station from the City of Grand Rapids at a public real estate auction on October 22, 1997. Thereafter, an Agreement for Sale of Real Property was executed in which Azzar promised to rehabilitate the property in accordance with all City of Grand Rapids Building Codes and Ordinances, within 12 months of the closing date, June 25, 1998. (Appendix 2b - 5b).

The repairs Azzar promised to make to the fire station were not completed in a timely fashion. In September of 1999 the Plaintiff-Appellant was charged with a violation of the City of Grand Rapids Building Maintenance Code. This charge was dismissed after Plaintiff submitted a plan for appropriate treatment for cleaning peeling paint on the buildings' brick exterior.

The exterior conditions constituting the violations of the City's Building Maintenance Ordinance continued to be ignored for approximately two years. This in spite of a letter from Plaintiff's attorney, sent to the City of Grand Rapids in February of 2001 promising that Azzar would restore the exterior of the fire station by the end of August 2001. (Appendix 6b - 8b). The property was subsequently reinspected and the City Building Inspector, Robert J. Kruis, determined that the promised repairs had not been made.

Thereafter, Plaintiff was charged with Building Maintenance Code violations related to Article 2, Property Maintenance Standards. The charge in the misdemeanor complaint stated that the Plaintiff:

1. Did fail to repair the exterior brick and mortar surfaces (8.207)
2. Did fail to remove peeling paint from the exterior of the building (8.207)

3. Did fail to protect the exterior wood, iron and steel surfaces from the weather by a properly applied water-resistant paint, stain or finish. (8.208)

4. Did fail to repair and make water-tight exterior doors and windows. (8.209)

[Appendix 27b - 28b.]

The necessary repairs were completed prior to the commencement of the non-jury trial. The completed repairs formed the basis for Plaintiff's acquittal on the charges by 61st District Judge, the Honorable David J. Buter. Plaintiff's counsel asserted for the first time on the opening day of that misdemeanor trial that the City lacked authority to promulgate its Building Maintenance Code, arguing that the Stille-DeRossett-Hale Single State Construction Code Act preempted the field of building maintenance. Judge Buter rejected this argument based on existing Michigan case law.

LAW AND ARGUMENT

I. Standard of Review.

As framed by this Court's order granting leave to appeal, the issue under consideration is "whether the Grand Rapids Building Maintenance Code is preempted by the Stille-DeRossett-Hale single state construction code act, MCL 125.1501, *et seq*., as amended by Pub Acts 1999, No. 245." This Court reviews questions of statutory interpretation de novo. *Taylor v Detroit Edison Co,* 475 Mich 109, 115; 715 NW2d 28 (2006); *AFSCME v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003). Likewise, "construction of administrative rules is also governed by the principles of statutory construction." *Alcona County v Wolverine Environmental Production, Inc*, 233 Mich App 238, 247; 590 NW2d 586 (1998), citing *Attorney General v Lake States Wood Preserving, Inc*, 199 Mich App 149, 155; 501 NW2d 213 (1993).

This case also involves review of a circuit court's ruling on a motion for summary disposition. The circuit court below denied Plaintiff's motion for summary disposition, and accordingly entered the stipulated judgment agreed to by the parties at facilitative mediation. Because the circuit court considered proofs beyond the pleadings when ruling on Plaintiff's motion for summary disposition, the circuit court's ruling was based upon MCR 2.116(C)(10). This Court reviews de novo decisions on motions for summary disposition. *Taylor, supra* at 115; *AFSCME*, *supra* at 398.

II. The Rules of Statutory Construction.

When reviewing questions of statutory construction, this Court's primary goal "is to discern and give effect to the Legislature's intent." *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 159; 615 NW2d 702 (2000), citing *Murphy v Michigan Bell*

Telephone Co, 447 Mich 93, 98; 523 NW2d 310 (1994). This Court necessarily begins its review by examining the plain language of the statute. *Nawrocki*, *supra* at 159. If the statute's language is clear and unambiguous, this Court assumes that the Legislature intended its plain meaning, and enforces the statute as written. *AFSCME*, *supra* at 399, quoting *Omelenchuk v Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002). "When statutory language is clear and unambiguous, judicial interpretation to vary the plain meaning of the statute is precluded." *Alcona*, *supra* at 246-247.

"It is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may [this Court] look outside the statute to ascertain the Legislature's intent." *Nawrocki*, *supra* at 159, citing *Turner v Auto Club Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). "In reviewing the statute's language, every word should be given meaning, and [this Court] should avoid a construction that would render any part of the statue surplusage or nugatory." *AFSCME*, *supra* at 399, quoting *Omelenchuk*, *supra* at 528. Furthermore, this Court "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *AFSCME, supra* at 400, citing *Omne Financial v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

> Statutory language should be construed reasonably and the purpose of the statute should be kept in mind. Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. Provisions of a statute are not construed in isolation, but, rather, in the context of other provisions of the same statute to give effect to the purpose of the whole enactment. In examining the plain language of a statute, the maxim "*expression unius est exclusion alterius*," the expression of one thing is the exclusion of another, means that the express mention of one thing in a statute implies the exclusion of other

similar things. Similarly, where powers are specifically conferred they cannot be extended by inference; indeed, the inference is that it was intended that no other or greater power was given than specified. Where an agency is charged to administer an act, as here, that agency's construction of the statute must be given deference, although it cannot be used to overcome the statute's plain meaning.

[*Alcona*, *supra* at 247 (internal citations and quotations omitted).]

III. The Michigan Constitution and the Home Rule Cities Act Vest the City of Grand Rapids With Authority To Enact A Building Maintenance Code.

Municipal power to enact local ordinances is described in *Rental Property Owners Association v Grand Rapids,* 455 Mich 246, 253-254; 566 NW2d 514 (1997), where the Court stated as follows:

> Grand Rapids is a home rule city. Home rule cities have broad powers to enact ordinances for the benefit of municipal concerns under the Michigan Constitution. Const 1963, art 7 §22 provides:
>
> > Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.
>
> Art 7, §34 of the Michigan Constitution states further:
>
> > The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.
>
> The authority of home rule cities to enact and enforce ordinances is further defined by the home rule cities act, MCL 117.1 *et seq*.; MSA 5.2071 *et seq*. It provides in relevant part:
>
> > For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not, for any act to advance the interests of the city, the

> good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state. [MCL 117.4j(3); MSA 5.2083(3).]
>
> The home rule cities act is intended to give cities a large measure of home rule. It grants general rights and powers subject to enumerated restrictions. *Detroit v Walker,* 445 Mich 682, 690; 520 NW2d 135 (1994); *Conroy v Battle Creek*, 314 Mich 210; 22 NW2d 275 (1946).
>
> [*RPOA, supra* at 253-254.]

In *Tally v Detroit*, 54 Mich App 328, 334; 220 NW2d 778 (1974), citing *People v Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945), the Court of Appeals noted that "[e]xcept by the constitution or by statute, the police power of Detroit as a home rule city is of the same general scope and nature as that of the state." The court went on to note at p. 335, that:

> The legitimacy of any exercise of police power depends upon "the existence of a real and substantial relationship between the exercise of those powers in a particular manner in a given case and the public health, safety, morals, or the general welfare". *Grocers Dairy Co v Dept of Agriculture Director*, 377 Mich 71, 76; 138 NW2d 767 (1966). An ordinance will be presumed to be constitutionally valid. *Watnick v Detroit*, 365 Mich 600, 606; 113 NW2d 876 (1962). The party claiming that an ordinance is unreasonable has the burden of so proving. *Michigan Towing Association, Inc v Detroit*, 370 Mich 440, 455; 122 NW2d 709 (1963).

It is well established that the regulation of building conditions, as a means to promote public health, safety and welfare, is a valid goal of municipal police power. *Wayne County Jail Inmates v Wayne County Sheriff*, 391 Mich 359, 367-368; 216 NW2d 910 (1974).

For all the above reasons, the Michigan Constitution of 1963 and the Home Rule Cities Act vest the City of Grand Rapids with authority to enact a Building Maintenance ordinance and prescribe for its enforcement.

IV. The Stille-DeRossett-Hale Single State Construction Code Act.

The legislation under scrutiny in this matter, the Stille-DeRossett-Hale Single State Construction Code Act ("the Act"), substantially modified the State Construction Code Act. Under the prior act the State Construction Code Commission prepared and promulgated the State Construction Code, which consisted of rules governing the construction use and occupancy of buildings. The previous act specified that the code applied throughout the state, except that local governments could exempt themselves from parts of the act and the code by adopting a nationally recognized model building code. The City of Grand Rapids adopted the Building Officials and Code Administrators (BOCA) code with local amendments as permitted under the State Construction Code Act.

Subsequently, the Stille-DeRossett-Hale Single State Construction Code Act was designed to address local amendments to model building codes which created a lack of state-wide uniformity in building codes across the state. It addressed this concern by providing for state-wide application of the Act and the state construction code as that term is defined in the Act. The Act specifies that the state-wide code consists of: (1) the international code council's residential code, (2) their building code, (3) their mechanical code, (4) their plumbing code, (5) the national electrical code published by the National Fire Prevention Association and (6) the Michigan Uniform Energy Code. The Act additionally specifies that this construction code may contain amendments, additions or deletions as proposed by the director of the Department of Consumer and Industry Services. MCL 125.1502(1)(j)(o); MCL 125.1504(2).[3]

[3] The Department of Consumer and Industry Services has subsequently been renamed the Department of Labor and Economic Growth, by executive reorganization order. See MCL 445.2011.

As provided for in the Act, the director did subsequently promulgate, in 2000 and again in 2003, the Michigan Building Code, the Michigan Residential Code, the Michigan Plumbing Code, the Michigan Mechanical Code, the Michigan Electrical Code and the Michigan Uniform Energy Code with amendments, additions or deletions as the director determined to be appropriate.

The language focused on in the instant lawsuit is, first of all, found at Section 8a(1) of the Act (MCL 125.1508a(1)) which provides that "this act and the code", that is the construction code as that term is defined in the Act, "apply throughout the state." The Act provides that promulgation of the state construction code was designed to effectuate the general purposes of the Act as well as the following objectives and standards:

> (3) The code shall be designed to effectuate the general purposes of this act and the following objectives and standards:
>
> a) To provide standards and requirements for construction and construction materials consistent with nationally recognized standards and requirements.
>
> b) To formulate standards and requirements, to the extent practicable in terms of performance objectives, so as to make adequate performance for the use intended the test of acceptability.
>
> c) To permit to the fullest extent feasible the use of modern technical methods, devices, and improvements, including premanufactured units, consistent with reasonable requirements for health, safety, and welfare of the occupants and users of buildings and structures.
>
> d) To eliminate restrictive, obsolete, conflicting and unnecessary construction regulations that tend to increase construction costs unnecessarily or restrict the use of new materials, products, or methods of construction, or provide preferential treatment to types or classes of materials or products or methods of construction.

e) To insure adequate maintenance of buildings and structures throughout the state and to adequately protect the health, safety and welfare of the people.

f) To provide standards and requirements for cost effective energy efficiency that will be effective April 1, 1997.

g) Upon periodic review, to continue to seek eve- improving, cost-effective energy efficiencies.

h) The development of a voluntary consumer information system relating to energy efficiencies.

[MCL 125.1504(3).]

The Act's preamble offers some limited additional assistance in understanding the purpose of The Act.[4] The preamble reads, in pertinent part:

> An act to create a construction code commission and prescribe its functions; to authorize the director to promulgate rules with recommendations from each affected board relating to the construction, alteration, demolition, occupancy, and use of buildings and structures; to prescribe energy conservation standards for the construction of certain buildings; to provide for statewide approval of pre-manufactured units; to provide for the testing of new devices, materials, and techniques for the construction of buildings and structures; to define the classes of buildings and structures affected by the act; * * * to provide for administration and enforcement of the act; to create a state construction code fund; to prohibit certain conduct; to establish penalties, remedies and sanctions for violations of the acts; . . .

The Legislature chose not to develop a specific section of the Act to further develop or set out its intent in passing the Act. The only express explanation that the Legislature chose to provide with regard to the passage of the Act is that found in the listing of the objectives and standards, found in MCL 125.1504(3)(a)-(h).

All of the objectives and standards set forth in the Act relate, as does the Michigan Building Code, to how construction under the Act is to occur. Indeed as previously noted,

the Act was designed to set a single statewide mark for construction so that a builder who is constructing similar homes in two communities would not be subject to two different construction codes, thereby promoting construction efficiency and cost reduction for all.

The Grand Rapids Building Maintenance Code is designed for a specific limited purpose. It directs when work is to be done on non-residential buildings. The standards for how that work is to be performed are set out in the Michigan Building Code. Plaintiff has demonstrated no direct conflict between the provisions of the Building Maintenance Code which were sought to be enforced against the Plaintiff and those of the Michigan Building Code or the International Property Maintenance Code.

V. The Act Does Not Expressly Preempt The City's Building Maintenance Code.

A. The Michigan Supreme Court's *Llewellyn* Standards for Statutory Preemption.

The Michigan Supreme Court decision most often referenced in preemption cases is *People v Llewellyn*, 401 Mich 314, 322-325; 257 NW2d 902 (1977), where the Court held:

> In making the determination that the state has thus pre-empted the field of regulation which the city seeks to enter in this case, we look certain guidelines.
>
> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted. *Noey v Saginaw,* 271 Mich 595; 261 NW 88 (1935).
>
> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history. *Walsh v River Rouge*, 385 Mich 623; 189 NW2d 318 (1971).

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[4] It is well established that while a preamble should not be considered authority for construing legislation, it may be useful for interpreting its purpose and scope. *Michigan Coalition for Responsible Gun Owners v Ferndale,* 256 Mich App 401, 410, n 6; 662 NW2d 864 (2003) citing *Malcom v East Detroit*, 437 Mich 132, 143; 468 NW2d 479 (1991); *People v Biller*, 239 Mich App 590, 594; 609 NW2d 199 (2000).

> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. *Grand Haven v Grocer's Cooperative Dairy Co*, 330 Mich 694, 702; 48 NW2d 362 (1951); *In re Lane*, 58 Cal 2d 99; 22 Cal Rptr 857; 372 P2d 897 (1962); *Montgomery County Council v Montgomery Ass'n, Inc*, 274 Md 52; 325 A2d 112, 333 A2d 596 (1975). While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.
>
> As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulations adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulations have generally been upheld.
>
> [Internal footnotes omitted.]

It is worth noting that this Court specifically considered the issue of whether state law preempted a local ordinance in the *Rental Property Owners Association* case. This Court reviewed the *Llewellyn* factors at pp 259-263 and found:

> We do not believe that uniformity of nuisance abatement procedures is necessary to further the state's interest, because the Grand Rapids padlock ordinance does not inhibit the state's ability to abate nuisances.
>
> * * * *
>
> The Grand Rapids padlock ordinance does nothing to restrict or interfere with proceedings under the state statute.
>
> * * * *
>
> Because there is no evidence that the nuisance abatement statute occupies the field that the ordinance addresses, the dissent must show that the ordinance directly conflicts with the state statute.
>
> * * * *
>
> In this case, the Grand Rapids padlock ordinance does not permit anything that the public nuisance statute prohibits, nor does it prohibit anything that the statute permits. Thus, we find that the ordinance does not directly conflict with the state nuisance abatement statute.
>
> Because there is no evidence that the nuisance abatement statute intended to occupy the field of nuisance abatement and because the

> ordinance does not directly conflict with the statute, we hold that the ordinance is not preempted.

The *RPOA* Court additionally noted that: "[A] municipal ordinance is preempted by state law if 1) the statute completely occupies the field that the ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute." *Id.* at 257.

B. Michigan Supreme Court and Court of Appeals Cases Finding Express Preemption.

The Court of Appeals below addressed the issue of preemption. The Court stated the law as "preemption by state law is concerned with . . . whether . . . the ordinance directly conflicts with a state statute." *Azzar ,supra* at *3, citing *RPOA*, *supra* at 257. The Court below went on to say that express preemption "occurs when the ordinance permits what the statute prohibits, or vice versa." *Id.*, citing *Llewellyn*, *supra* at 322, n 4. The Court of Appeals has, over the years, consistently applied a general test for express preemption based on *RPOA* and *Llewellyn*, which is summarized as follows: state law preempts a municipal ordinance where the ordinance directly conflicts with the state statute. A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *Board of Trustees of the Policemen and Fireman Retirement System v Detroit*, 270 Mich App 74, 84; 714 NW2d 658 (2006); *Charter Township of Shelby v Papesh*, 267 Mich App 92, 105-106; 704 NW2d 92 (2005); *Howell Township v Rooto Corp*, 258 Mich App 470, 467-477; 670 NW2d 713 (2003); *MCGRO, supra.*

AFCSME, supra is a recent decision of this Court dealing with the issue of express preemption. This Court in *AFCSME* examined the preemptive effect of the 1996 amendments to the Michigan Housing Facilities Act, MCL 125.651 *et seq.* as that

legislation related to a Detroit municipal ordinance affecting a local housing commission. The Detroit ordinance required the mayor and city council to take certain actions regarding the setting of compensation for housing commission employees. By way of contrast, the state statute gave the local housing commission "exclusive authority" to fix the compensation of its director and employees. In a unanimous decision, this Court found that the provisions of the Detroit city ordinance under review "directly contradict the express language of MCL 125.655(3)." *Id.* at 414. The Detroit ordinance was therefore found to be expressly preempted by state law.

This Court also found express preemption in the case of *Noey v Saginaw*, 271 Mich 595; 261 NW 88 (1935). Both the *Llewellyn* and the *RPOA* cases previously cited relied on *Noey* in stating the law on express preemption. The *Llewellyn* Court recounted the *Noey* decision as follows:

> In *Noey*, the State Constitution granted the Legislature the authority to establish a Liquor Control Commission which, subject to statutory limitation, shall exercise complete control of the alcoholic beverage traffic within the state."

The Court went on to state that pursuant to this constitutional provision, the Legislature enacted a state statute creating a Liquor Control Commission which provides "[E]xcept as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic . . ." The City of Saginaw had attempted to control permissible time periods for selling alcoholic beverages by ordinances. In light of the underlying state constitutional and statutory provisions, the Court in *Noey* found there was express preemption and local governments were precluded from regulating the business hours of liquor license establishments.

The Court of Appeals has also found express preemption in two of its recent decisions. In *Bd of Trustees of the Policemen and Firemen Retirement System, supra,* the Court of Appeals held that state law preempted a Detroit city ordinance. The challenged ordinance, it was determined, directly interfered with the Retirement Systems Board's authority to decide the annual contribution to the pension fund, which included a determination of the amortization periods. The state statute, MCL 38.1140m, authorized the Pension Board to set the annual amortization periods. However, the Detroit ordinance also specifically set the annual amortization period. The Court held that "the ordinance clearly conflicts with the statute, and the statute prevails over the ordinance." *Id.* at 85.

In *Papesh, supra,* the Court of Appeals examined a township zoning ordinance provision as applied to raising poultry, in light of the Right to Farm Act, MCL 286.471, *et seq.* The Right to Farm Act contains clear express language relating to preemption. The statute provides:

> [I]t is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as other provided in this section, a local unit of government shall not enact, maintain, or enforce any ordinance, regulation or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act. *Id*. at 106.

The Court of Appeals determined that in light of this clear expression, the Right to Farm Act certainly preempted a local township zoning ordinance, which attempted to regulate an otherwise protected farm operation by limiting the size of the farm.

C. The Act Does not Expressly Include the IPMC in the State Construction Code.

Applying the analysis set out in the cases referenced above, it is clear that the Act does not expressly provide for exclusive state regulation for property maintenance. The Act does expressly state that: "This act and the code shall apply throughout the state." MCL 125.1508a(1). However, the term "code" is specifically defined by the Act to mean "the state construction code provided for in section 4." MCL 125.1502a(1)(j). Section 4 of the Act further states that the state construction code "shall consist of" six very specific codes. MCL 125.1504(2). The Act provides, in pertinent part:

> . . . The Code shall consist of the International Residential Code, the International Building Code, the International Mechanical Code, the International Plumbing Code published by the International Code Council, the National Electrical Code published by the National Fire Prevention Association, and the Michigan Uniform Energy Code with amendments, additions, or deletions as the director determines appropriate.

These referenced international codes comprising the construction code by specific statutory language were designed to effectuate the purposes of The Act and the listed objectives and standards. MCL 125.1504(3).

It is clear that the International Property Maintenance Code is not one of the six specific codes which comprise the state construction code. MCL 125.1504(a). In examining the plain language of this statutory section, "the maxim '*expression unius est exclusion alterius*,' the expression of one thing is the exclusion of another," means that the express mention of one thing in the Act implies the exclusion of other similar things. *Alcona*, *supra* at 247. As the Act specifically listed six codes which comprise the state construction code, that express list of six codes necessarily implies the exclusion of all other codes not mentioned therein. The Act simply does not say that the International

Property Maintenance Code is part of what comprises the state construction code. Therefore, the IPMC cannot expressly preempt the City's Building Maintenance Code. The Act's preamble, the closest thing to a purpose statement (aside from the listed objectives and standards) certainly underlies and supports the provisions in MCLA 125.1504(3).[5]

D. Plaintiff-Appellant's Argument Is Focused Solely on the Word "Maintenance".

Plaintiff-Appellant's first argument is based completely on the word "maintenance." He first points to the word "maintenance" in MCL 125.1504(3)(e) to support his arguments of express preemption. However, each of the subparagraphs referenced in MCL 125.1504(3) relate to articulated objectives and standards for work, that is, the "how" of the international codes. The International Residential, Building, Plumbing and Mechanical Codes, along with the National Electrical Code from the National Fire Prevention Association and the Michigan Uniform Energy Code all offer direction on how work undertaken is to be completed. MCL 125.1504(e), in and of itself, however, would certainly not compel a conclusion that the Legislature expressly intended to preempt the entire area of property maintenance by mandating that the International Property Maintenance Code become the law of the State of Michigan. That would have been easy enough to accomplish by including a specific reference in MCL 125.1504(2), which the Legislature chose not to do. It is, however, on the slender reed of MCL 125.1504(e) that Plaintiff-Appellant constructs his argument of express preemption.

Plaintiff-Appellant next moves to the specific provisions of the International Building Code. At Section 101.2, Scope, of the International Building Code, the Plaintiff points to

[5] It should be noted by the Court that the word "maintenance" is not included in the Act's preamble.

the word “maintenance” in further support of his argument for express preemption. This particular section of the International Building Code needs to be read, however, in context with the International Building Code Section 101.3, which states:

> 101.3 Intent. The purpose of this code is to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress, facility stability, sanitation, adequate light and ventilation, energy conservation and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to firefighters and emergency responders during emergency operations. (Appendix 15b, 21b)

When read in context, the provisions of 101.3 shows the purpose of the International Building Code is to establish *minimum* requirements [objectives and standards - MCL 125.1504(3)] applicable to activities generally described in the scope provision found at 101.2. Neither of these provisions, which were subsequently included in the Michigan Building Code, compel the conclusion of express preemption argued by Plaintiffs herein.

Moving along the chain of his argument Plaintiff next points to Section 101.4.5 of the International Building Code. The general provisions of 101.4 and the subsequent chapter 35 of the International Building Code incorporate a dizzying array of referenced standards. One of the standards is the International Property Maintenance Code, as found in International Building Code Section 101.4.5. The provisions of International Building Code Section 101.4.5 and Chapter 35 were subsequently promulgated as part of the Michigan Building Code.

Interestingly, the International Code Council’s referenced standards in turn incorporate additional referenced standards. The IPMC, for example, incorporates the International Code Council’s International Zoning Code. (Appendix 67b, 94b) The natural extension of Plaintiff’s argument is that the Legislature then also has expressly made the

International Zoning Code the law of the State of Michigan, and thus all local zoning ordinances are expressly preempted by state law.

Plaintiff finally argues that the Act, at Section MCL 125.1504(5) completes its express preemption argument. MCL 125.1504(5) provides:

> (5) The Code may incorporate the provisions of a code, standard, or other material by reference. The director shall add, amend, and rescind rules to update the Code not less than once every three years to coincide with the national codes change cycle.

It is therefore by the referenced adoption of the IPMC and the director's authority to "incorporate the provisions of a code, standard, or other material by reference" that finally gets Plaintiff to the point he asserts supports his claims of express preemption of the Grand Rapids Building Code is required.

E. <u>There Is No Direct Conflict Between the Michigan Building Code, the IPMC and the City's Building Maintenance Code</u>.

Defendant asserts that express preemption requires more. Certainly under the case law cited in *Llewellyn, supra* and *RPOA, supra*, state law preempts a municipal ordinance where the ordinance directly conflicts with the state statute. A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. Plaintiff has made no arguments that the City of Grand Rapids Building Maintenance Code directly conflicts with the Act. Plaintiff has not demonstrated that the City's Building Maintenance Code permits what the state statute prohibits, or that it prohibits what the state statute permits.

The Plaintiff, without more, seizes on the word "maintenance" in the Act and then in the International Building Code and the Michigan Building Code to reach a conclusion that regardless of the actual provisions of the Grand Rapids Building Maintenance Code, the

International Property Maintenance Code is the law of the State of Michigan and, as such, preempts all local regulations in the area of property maintenance. That is not the present case law of the State of Michigan and Defendant contends that it should not become the case law of the State of Michigan.

F. <u>The Michigan Building Code Section 102.2, Other Laws</u>.

The Plaintiff's argument has an additional defect. The Act, at MCL 125.1504(2) specifically provides for the adoption of the six mandated codes "with amendments, additions or deletions as the director determines appropriate."

The 2003 International Building Code and the 2003 Michigan Building Code, as promulgated by the director, both contain a Section 102.2. This section of the International Building Code and the Michigan Building Code provides:

> **102.2 Other Laws.** The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law. (Appendix 23b, 43b)

The director included this particular section in both the 2000 and the 2003 versions of the Michigan Building Code. Defendant argues that if MCL 125.1504(2) is to have any force and effect, the fact that the director, given his statutory authority, included both the provisions of 101.4.5 (International Property Maintenance Code) and 102.2 (Other Laws) is significant. These two sections must be read together. Section 102.2 simply says, in this context, that the International Property Maintenance Code shall not nullify (i.e., expressly preempt) the City of Grand Rapids Building Maintenance Code.

G. Plaintiff Improperly Attempts to Render Section 102.2 of the Michigan Building Code Nugatory and Mere Surplusage.

In this case, the circuit court held that Defendant's Building Maintenance Code is not preempted, given the language contained in §102.2 of the Michigan Building Code.[6] The circuit court held that this code language requires a conclusion that Defendant's Building Maintenance Code is not preempted. The circuit court noted that, "although the Michigan Building Code incorporates the International Property Maintenance Code, it does so with the provision that local law is not preempted. The express preemption of the state act is limited to the subject matter of the six codes listed therein. Therefore, I find no express preemption of the city Building Maintenance Code."

Plaintiff argues that the circuit court's interpretation of §102.2 of the Michigan Building Code is flawed because §102.2 "contradicts the express intent of its enabling statute," MCL 125.1508a(1), and is therefore void.[7] Plaintiff further argues that §102.2 of the Michigan Building Code must be "harmonized" with the MCL 125.1508a(1). In truth, what Plaintiff seeks is for this Court to completely ignore the language of §102.2 of the Michigan Building Code. In the name of "harmonizing" the Michigan Building Code with the Act, Plaintiff asks the Court to completely jettison §102.2, rendering it nugatory and mere surplusage. This Court should reject Plaintiff's argument on this point.

One of the most basic principles of statutory construction is that, "In reviewing the statute's language, every word should be given meaning, and [this Court] should avoid

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[6] This holding is expressed in the opinion authored by 61st District Judge Jeanine LaVille, as adopted by the circuit court, Chief Judge Paul Sullivan.

[7] Contrary to Plaintiff's argument at pp 33-34 of his Brief, Defendant does not contend that §102.2 of the Michigan Building Code authorizes the City of Grand Rapids' enactment of its Building Maintenance Code. Defendant has maintained from the outset of this suit that the City of Grand Rapids derives its power and authority to enact its Building Maintenance Code from the Michigan Constitution of 1963 and the Home Rule Cities Act.

a construction that would render any part of the statue surplusage or nugatory." *AFSCME*, *supra* at 399. Administrative rules are likewise subject to the rules of statutory construction. *Alcona*, *supra* at 247. Therefore, the language of §102.2 of the Michigan Building Code must be given *some* meaning, and this Court should avoid adopting a construction that would render of §102.2 surplusage or nugatory.

The Act does expressly state that: "This act and the code shall apply throughout the state." MCL 125.1508a(1). However, the term "code" is specifically defined by the Act to mean "the state construction code provided for in section 4." MCL 125.1502a(1)(j). Section 4 of the Act further states that the state construction code "shall consist of" six very specific codes. MCL 125.1504(2). One of those specific codes is the International Building Code, "with amendments, additions, or deletions as the director deems appropriate." MCL 125.1504(2). The parties do not dispute that the Michigan Building Code is the International Building Code, as modified by the director.

However, it is clear that the IPMC is not one of the six specific codes which comprise the state construction code. MCL 125.1504(a). In examining the plain language of this administrative rule, "the maxim '*expression unius est exclusion alterius*,' the expression of one thing is the exclusion of another," means that the express mention of one thing in the Act implies the exclusion of other similar things. *Alcona*, *supra* at 247. Because the Act specifically listed six codes which comprise the state construction code, that express list of six codes necessarily implies the exclusion of all other codes not mentioned therein. The Act simply does not say that the IPMC is part of what comprises the state construction code.

When properly understood, the language of the Act compels a conclusion that the Michigan Building Code applies throughout the state. MCL 125.1508a. However, the other ancillary codes referenced within the Michigan Building Code do not carry this express preemptive effect. Those ancillary codes are not listed in the Act as components of the state construction code. Furthermore, the Michigan Building Code tells us expressly that those ancillary codes "shall not be deemed to nullify any provisions of local . . . law." Michigan Building Code, §102.2.

Section 102.2 of the Michigan Building Code can certainly be read and construed "in harmony" with MCL 125.1508a.[8] The proper conclusion is that the Act expressly preempts local municipalities from enacting their own building codes. However, the Act does not expressly preempt local municipalities from enacting their own versions of any of the ancillary codes adopted by reference within §102.2 of the Michigan Building Code. This conclusion is compelled by the language of the Michigan Building Code itself, which expressly limits its own scope and authority.

Furthermore, Plaintiff would have this Court step into the shoes of the administrative rule maker and legislate such rules from the bench. The Act provides that the state construction code consists of (among five other codes) the International Building Code, "with amendments, additions, or deletions as the director deems appropriate." MCL 125.1504(2). Thus, the director has the authority to delete §102.2 from the Michigan Building Code. If he chose to do so, then the ancillary codes adopted by reference within the Michigan Building Code would apply throughout the state and

[8] Therefore, Plaintiff's argument that §102.2 "contradicts the express intent of its enabling statute," MCL 125.1508a(1), is without merit.

local municipalities would be expressly preempted from enacting local ordinances on the topic matters addressed by those ancillary codes.

The director chose not to delete §102.2 from the Michigan Building Code, as that language continues to appear in the 2003 version of the Michigan Building Code. This is a clear indication that the administrative agency charged with administering and enforcing the Act and the State Construction Code did not feel that local maintenance codes should be abrogated. The director apparently concluded that local property maintenance codes could co-exist with the state construction code, and that having differing property maintenance codes throughout the state was acceptable.

Plaintiff would ask this Court to remove that discretionary decision from the hands of the director. Plaintiff would ask this Court to enact administrative rules from the bench, and to effectively repeal an administrative code provision which the director has not chosen to remove from the Michigan Building Code. This Court should decline this invitation to do so. Instead, this Court should recognize and give effect to the director's decision to leave §102.2 in the Michigan Building Code.

For all of the above reasons, this Court should find that the City's Building Maintenance Code is not expressly preempted by the Stille-DeRossett-Hale Single State Construction Code Act, as amended by 1999 Public Acts, No. 245.

H. The Plaintiff-Appellant's Argument Challenging the Court of Appeals Interpretation of the Term "Construction Regulations" Is Not Relevant.

This Court has narrowly focused the issue to be argued before the Court. This Court has directed the parties' arguments to the preemptive impact of Public Acts 1999, No. 245. A portion of Plaintiff's argument continues to address his contentions that the

City's Building Maintenance Code was void from its adoption in 1987 and the Court of Appeals' rejection of that claim.

The Court of Appeals analyzed the State Construction Code, as amended by Public Acts 1980, No. 371. The Court of Appeals determined that "construction regulations adopted by a city would be rendered invalid after promulgation of the State Construction Code, except as provided in MCL 125.1508". *Azzar, supra* at *7. Plaintiffs' brief in this Court goes on to argue that the Court of Appeals incorrectly determined that the City's Building Maintenance Code was not an invalid construction regulation.

Plaintiff's arguments do not address the issue as focused by this Court's order granting leave to appeal, May 4, 2006. This portion of Plaintiff's arguments do not in any way address or consider the preemptive effect of Public Acts 1999, No. 245. This portion of Plaintiff's arguments deals only with Plaintiff's claim that the City's Building Maintenance Code, as enacted in 1987, was void and preempted by the State Construction Code then in force and effect. The Plaintiff's analysis is doubly irrelevant in that Public Act 1999, No. 245, redefined the term construction regulation as "a law, act, rule, regulation, or code, general or special, or compilation thereof, enacted or adopted before or after January 1, 1973 by the state . . . ." MCL 125.2502(a)(m). As such, under the Act, the defined term "construction regulation" doesn't even relate to an ordinance enacted by the City of Grand Rapids. All of Plaintiff's arguments which are unrelated to Public Acts 1999, No. 245, should be rejected by this Court as not relevant to the issue of the preemptive effect of the Act.

VI. The Act Does Not Impliedly Preempt The City's Building Maintenance Code.

Plaintiff does not present any argument on appeal that the Act impliedly preempts the City's ordinance. Instead, Plaintiff focuses his appeal solely on claimed express preemption. Because Plaintiff has not claimed implied preemption on appeal, this Court should decline to consider the issue. Nonetheless, as this Court's order granting leave to appeal did not restrict the issue presented to express preemption alone, and as the circuit court and the Court of Appeals both addressed the issue of implied preemption in their decisions, Defendant will also address the issue of implied preemption here.

When examining questions of implied preemption, this Court has established three criteria that should be applied. These are the second through fourth criteria set forth in *Llewellyn, supra*. The factors to be examined when deciding a question of implied preemption are: (1) whether pre-emption of a field of regulation may be implied upon an examination of legislative history; (2) whether the pervasiveness of the state regulatory scheme may support a finding of preemption; and (3) whether the nature of the regulated subject matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. *Llewellyn, supra* at 323-324.

In this case, none of these three factors gives rise to an implied preemption of the City's Building Maintenance Code by the Act, as amended by 1999 Pub Acts 245.

A. The Legislative History Does Not Support a Finding of Implied Preemption.

Under *Llewellyn's* test for implied preemption, this Court is asked to examine whether preemption of a field of regulation may be implied upon an examination of legislative history. However, Michigan courts have recognized that "legislative analysis is of limited value in interpreting a statute." *VanBuren Charter Twp v Garter Belt, Inc*, 258

Mich App 594, 607-608; 673 NW2d 111 (2003). Therefore, this factor appears to carry minimal weight in deciding the question of implied preemption.

1. The Lower Courts Found No Preemption Implied by the Legislative History.

In this case, both the trial court and the Court of Appeals examined the question of implied preemption. In both of those decisions, the lower courts found no support in the legislative history for the conclusion that the City's Building Maintenance Code was impliedly preempted by the Act. First, the circuit court stated as follows, with regard to its analysis of the legislative history:

> The legislative history of the state act does not support a finding of implied preemption. Clearly, if the legislature had intended the state act to preempt local authority in the area of property maintenance, it could have included the International Property Maintenance Code in section 1504(2). [MCL 125.1504(2).] In fact, legislation establishing a statewide property maintenance code was introduced in the House but never enacted. House Bills 4834, 4835 (1999). Based on the legislature's decision not to include property maintenance in its statewide construction legislation, I conclude that the legislature did not intend to preempt local authority in this area.
>
> [Appendix 298a - 299a.]

The Court of Appeals applied a somewhat more abbreviated approach to the issue of legislative history, holding simply:

> Although we agree that the legislative history is not a useful guideline, we are nonetheless left without any legislative history implying that the Legislature intended the Construction Act to totally preempt ordinances in the area of property maintenance.
>
> [*Azzar*, *supra* at *8-9, citing *VanBuren Charter Twp*, *supra* at 605.]

This Court should affirm the holdings of the lower courts with regard to this issue. As the lower courts aptly pointed out, there is simply no mention in the legislative history of any intent to preempt local maintenance codes through passage of the Act. Indeed, the

Plaintiff has provided no documentary evidence of any legislative history in support of an implied preemption argument.

In addition, the circuit court's decision correctly noted that the Legislature could have included the International Property Maintenance Code within the list of specified codes contained in MCL 125.1504(2), when the Legislature determined which individual codes would comprise the state construction code. The Legislature chose not to do so. The maxim "*expression unius est exclusion alterius*," the express mention of one thing is the exclusion of another, must be applied here. *Alcona*, *supra*. The fact that the Legislature did not include the IPMC within the listing of codes set forth in MCL 125.1504(2) compels a conclusion that the Act does not impliedly preempt the City's Building Maintenance Code, with regard to the examination of the Act's legislative history.

2. Other Provisions of State Law Require a Finding of No Implied Preemption, Based on the Legislative History Factor of the *Llewellyn* Test.

This Court's order granting leave to appeal directed the parties to examine and discuss the effect of 1999 Pub Acts 245 on the Act, and on the City's Building Maintenance Code. 1999 Pub Acts 245 did not expressly repeal conflicting statutes and ordinances, but only did so by implication.[9] However, subsequent legislative acts underscore the fact that the passage of 1999 Pub Acts 245 was not intended to impliedly preempt or repeal either local maintenance codes or the state's housing maintenance statute, contained in "Article IV, Maintenance" of 1917 Pub Acts 167, the Housing Law of Michigan. (MCL 125.465 - MCL 125.488).

[9] For example, the authorization in the Home Rule Cities Act, MCL 117.3(k), that allows adoption by reference of model building codes and other trade codes by Home Rule Cities is repealed by implication, as a result of the Single State Construction Code Act's declaration that "this act and the code apply throughout the state."

In 2004, the Legislature determined that standards for the installation of smoke detectors in existing dwellings should be developed by the director, for promulgation as part of the state construction code (2004 Pub Acts 65; MCL 125.1504(c)). However, the Legislature recognized the continuing viability of the Housing Law's maintenance provisions and local ordinances, when it tie-barred 2004 Pub Acts 65 to 2004 Pub Acts 64; MCL 125.482(a). The latter legislative act adds a section to "Article IV Maintenance" of the Housing Law of Michigan which required class "A" multiple dwellings to be equipped with smoke detectors that comply with the standards set forth in the state construction code, promulgated under MCL 125.1504(c).

Thus, in 2004, the Legislature recognized the continuing viability of a statutory scheme (the Housing Law of Michigan) in which the standards for how alterations and maintenance are performed are set forth in the Stille-DeRossett-Hale Single State Construction Code Act. Yet, the Housing Law of Michigan continues to authorize the regulation of dwelling maintenance by certain municipalities.

Considering the failure of 1999 Pub Acts 245 to explicitly preempt or repeal the enacting of commercial property maintenance codes under MCL 117.3(j) and the continuing validity of local housing maintenance codes under the Housing Law of Michigan (MCL 125.408 allows municipalities to set even higher maintenance standards than those contained in the state act) and the Legislature's continuing reliance on the maintenance standards of the Housing Law of Michigan, it is clear there was no legislative intent to repeal by implication the authority granted to Home Rule Cities to enact residential and non-residential maintenance codes.

3. The Official Commentary to the International Building Code Reveals No Intention to Preempt Local Property Maintenance Ordinances.

The Stille-DeRossett-Hale Single State Construction Code Act expressly provides that: "this act and the code shall apply throughout the state." MCL 125.1508a(1). However, the term, "code" is specifically defined by the Act to mean "the state construction code provided for in Section 4." MCL 125.1502a(i)(j). Section 4 of the Act further mandates that:

> . . . the code shall consist of the international residential code, the international building code, the international mechanical code, the international plumbing code published by the international code council, the national electrical code published by the national fire prevention association, and the Michigan uniform energy code with amendments, additions, or deletions as the director determines appropriate.

Furthermore, the statutorily mandated International Building Code includes the following provision:

> **102.2 Other laws.** The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law.

Interestingly, the official comment to the International Building Code (which the Legislature mandated as the basis for the Michigan Building Code) underscores the limited nature of any preemptive authority of the Building Code, and its peaceful coexistence with other laws. The comment states as follows:

> **102.2 Other laws.** The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law.
>
> ❖ In some cases, other laws enacted by the jurisdiction or the state or federal government may be applicable to a condition that is also governed by a requirement in the code. In such circumstances, the requirements of the code are in addition to that other law which is still in effect, although the building official may not be responsible for its enforcement. (Appendix 23b)

The International Building Code Commentary further explains at Section 101.4 how the International Property Maintenance Code simply enables the code enforcement official to address unsafe conditions in existing structures. (Appendix 21b) With regard to Section 101.4.5 Property Maintenance, the Code Commentary explains that the building code's applicability to existing structures set forth in Section 101.2 and Chapter 34 is generally limited to new work or changes in use that occur in these buildings. (Appendix 22b) That explanation underscores the fact that the purpose of the Michigan Building Code is to establish standards for how work is done in constructing new buildings, as well as altering and maintaining existing buildings. In contrast, the purpose of the City's Building Maintenance Code is to establish standards for when repair work should be done to existing buildings.

B. The State Regulatory Scheme is Not So Pervasive as to Support a Finding of Implied Preemption.

The next test set forth in *Llewellyn* is also not met, in that the state regulatory scheme is not so pervasive in its regulation of property maintenance requirements, that a finding of implied preemption may be supported. In fact, as it has done for many years, the City of Grand Rapids continues to simultaneously enforce both state-wide construction codes and its own local property maintenance code, since they are complementary.

1. The Lower Courts Found No Preemption Implied by Pervasiveness of the State Statutory Scheme.

Both the trial court and the Court of Appeals concluded that the City's Building Maintenance Code was not impliedly preempted, under this prong of the *Llewellyn* analysis. The circuit court held as follows with regard to this portion of the *Llewellyn* test:

> The second factor enumerated in *Llewellyn* is the pervasiveness of state regulation. While the International Property Maintenance Code is comprehensive in its scope,
>
> > Pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption. [*Llewellyn*, *supra*,] 401 Mich at 324.
>
> Certainly, extensive state and local regulations coexist in such areas as traffic enforcement. This factor alone does not compel a finding of implied preemption in this case.
>
> [Appendix 299a.]

Furthermore, the Court of Appeals held as follows with regard to this portion of the *Llewellyn* test:

> Also, the regulatory scheme is not so persuasive to support a finding of total preemption. The international property maintenance code (IPMC) is material to the state construction code because it was incorporated to the prescribed extent of its reference in the international building code, and was made part of the Michigan Building Code pursuant to 2001 AACS, R 408.30401 *et seq*. But because the international building code, §102.2 (2000 edition), itself expressly contemplates that it does not nullify any local law, the third *Llewellyn* guideline does not support total preemption.
>
> [*Azzar, supra* at *9.]

This Court should affirm the holdings of the lower courts with regard to this issue. As this Court noted in *Llewellyn*, pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption. The state construction code does create a pervasive state regulatory scheme with regard to construction regulations. The only way in which the state construction code can be said to create a pervasive state regulatory scheme with regard to building maintenance is through the Michigan Building Code's adoption by reference of the International Property Maintenance Code. Yet, the Michigan Building Code itself indicates that it is not intended to nullify any provisions of local law. Given this language in the Michigan Building Code, this Court should affirm

the lower court's decisions that this factor of the *Llewellyn* analysis does not support a finding of implied preemption.

2. The State Regulations Can Peacefully Co-Exist With Local Property Maintenance Ordinances.

The Act provides that the state construction code shall consist of rules governing the "construction, use, and occupation of buildings" and shall be designed to effectuate the general purposes of the Act and several specific objectives and standards. MCL 125.1504. While one of those general purposes is to "insure adequate maintenance of buildings", that objective relates to *how* maintenance work is performed once it is undertaken, not *when* it is required to be performed.

Defendant contends that the regulatory scheme created by the Act can and does peacefully co-exist with local property maintenance ordinances, such as the ordinance in effect in Grand Rapids. The Act and the state construction code (through the Michigan Building Code as one of its component parts) governs how maintenance work is performed. The City's property maintenance ordinance simply provides a triggering mechanism to indicate when such work is required to be performed. While a local government may enact and enforce standards for the maintenance of residential and commercial buildings, property owners are expected to comply with the Act and state codes, concerning the manner in which they undertake to make repairs.

In this case, the City's Building Maintenance Code dictated that Plaintiff must make certain repairs to 312 Grandville S.W., including:

1. All windows and exterior doors shall be weather-tight and in good repair. (Sec. 8.209)
2. All exposed surfaces (wood or material which may deteriorate from exposure to weather) shall be covered by weather-resistant paint, stain or other waterproof finish. (Sec. 8.208)

3. Exterior brick and mortar shall be weather-tight and in good repair and shall not have any holes, cracks or deterioration. (Sec. 8.207)

In undertaking the above work, the Plaintiff was expected to comply with the Michigan Building Code provisions for whether a permit is required, design standards and materials.

The Act and the Building Maintenance Code do not conflict, they complement each other. The Building Maintenance Code directs what work a property owner must undertake and the Michigan Building Code directs how the work is to be done. In some cases, the nature of the repair work required by the Building Maintenance Code may be so minor that a permit pursuant to the Michigan Building Code is not required, and the Act does not impact the work.

For example, if the glass in a window in a commercial structure is broken or missing, that would be a violation of Section 8.209 of the City's Building Maintenance Code, which states:

> All exterior windows and doors shall be weathertight and in good repair or shall be secured against weather by boarding painted a color matching that of the adjacent exterior siding.

The owner may simply remove any broken glass, install a new pane of glass and glazing and meet the requirement of the Building Maintenance Code that the broken or missing glass be replaced, without having to obtain a building permit.

Another example will illustrate that both the Michigan Building Code and the City's Building Maintenance Code apply without any conflict. For example, if the owner of a building with a window that has broken or missing glass needs to replace a structural member or they want to replace the entire window with a larger or smaller window, that would involve the type of structural alteration which would require an

application for a building permit. Thus, the motivating factor for the work being done may be the City's Building Maintenance Code requirement that the window be kept in good repair, but the level of work the owner decided to undertake would trigger the application of the Michigan Building Code. In every case, when the work has been properly completed pursuant to the Michigan Building Code, it will meet the requirement of the City's Building Maintenance Code that the window shall be weather-tight and in good repair.

3. The International Property Maintenance Code Itself Recognizes the Need for Adoption by Local Ordinance Before it Takes Effect in any Municipality.

Furthermore, the 2003 International Property Maintenance Code ("IPMC") itself contains an express recognition that it is not intended to apply in a particular jurisdiction unless that local jurisdiction's legislative body chooses to adopt the IPMC by ordinance. The 2003 IPMC (the most recent version in publication) contains a sample ordinance for adoption of the IPMC by local jurisdictions. (Appendix 72b-73b). That portion of the IPMC states: "The *International Codes* are designed and promulgated to be adopted by reference by ordinance." (Appendix 72b) (emphasis in original). The sample ordinance that follows provides, at section 3:

> That Ordinance No. ___ of [JURISDICTION] entitled [FILL IN HERE THE COMPLETE TITLE OF THE ORDINANCE OR ORDINANCES IN EFFECT AT THE PRESENT TIME SO THAT THEY WILL BE REPEALED BY DEFINITE MENTION] and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.
>
> [Appendix 72b.]

As an initial matter, it should be noted that no such sample ordinance appears in the 2000 IPMC. (Appendix 46b-67b). The sample ordinance was added to the next

revision of that code, the 2003 IPMC. This addition to the IPMC indicates, as recently as 2003, an express acknowledgement that a local municipality needed to enact an ordinance in order to adopt the IPMC and make that international code effective in that local jurisdiction.

Furthermore, the inclusion of the referenced language found in section 3 of the sample ordinance is significant. That language, referenced above, indicates a belief on the part of the drafters of the 2003 IPMC that local jurisdictions still existed, in which "ordinances or parts of ordinances" were in direct conflict with the IPMC, and that such conflicting local ordinances had to be specifically repealed "by definite mention" by the municipality's legislative body, before the IPMC could become the governing property maintenance code in that jurisdiction. The drafters of the 2003 IPMC clearly stated a belief that the IPMC could not supplant directly conflicting local property maintenance ordinances unless and until the local municipalities took the affirmative step of adopting the IPMC for use in their jurisdictions, by enacting a local ordinance.

It is difficult to imagine how it could be made any more clear, that the IPMC was not intended to occupy the entire field of property maintenance, in derogation of preexisting local ordinances, including those local ordinances that directly and expressly conflicted with the IPMC.

C. The Nature of the Regulated Subject Matter Does Not Demand Exclusive State Regulation in the Area of Property Maintenance Standards.

Considering the final *Llewellyn* factor, the nature of property maintenance code regulation does not demand exclusive state regulation, since complete statewide uniformity is neither necessary nor desirable. Certainly, there is a need for consistent

statewide regulation with regard to a construction code, so that developers who are constructing homes and commercial structures throughout the state are not subject to a patchwork of different construction codes. However, there is no such need for consistent statewide regulation with regard to issues of property maintenance, regarding existing structures.

1. The Lower Courts Found No Implied Preemption Due to Any Need for Exclusive State Regulation.

In this case, both the trial court and the Court of Appeals concluded that the City's Building Maintenance Code is not impliedly preempted under the final prong of the *Llewellyn* test. The circuit court held as follows with regard to this portion of the *Llewellyn* test:

> Finally, property maintenance is not a subject matter demanding state regulation. There is no harm--and indeed, there is great benefit--in allowing municipalities to set standards for property maintenance based on local needs and resources. I, therefore, find no implied preemption based on the nature of the regulated subject matter.
>
> The purpose of the Single State Construction Act, as stated in the legislative analysis, is to eliminate the many different local codes which cause expense and delay for contractors who do business in various local jurisdictions. This compelling rationale does not apply to property maintenance codes. When an individual or business chooses to locate in a particular community, it is not unreasonable to expect that person or entity to learn and comply with local property maintenance standards.
>
> [Appendix 299a - 300a.]

Furthermore, the Court of Appeals held as follows with regard to this portion of the *Llewellyn* test:

> Finally, we are not persuaded that the regulated subject matter demands exclusive state control. *VanBuren Charter Twp, supra* at 605. Although the Construction Act has consistently provided for a code "to insure adequate maintenance of buildings and structures," MCL 125.1504(3)(e),

> "parallel subject matter simply does not require a finding of preemption. *Rental Property Owners Ass'n, supra* at 261.
>
> [*Azzar*, *supra* at *9-10.]

2. Municipalities Must Be Permitted Flexibility in Dealing With Local Needs, Regarding Property Maintenance Standards.

Curiously, the scope of the International Property Maintenance Code exceeds the physical care of structures. In Section 302-Exterior Property Areas, the 2000 Code provided, in pertinent part:

> **302.4 Weeds.** All premises and exterior property shall be maintained free from weeds or plant growth in excess of 10 inches (254 mm). (Appendix 57b)

Under the interpretation promoted by the Plaintiff, the Legislature reportedly preempted the field of lawn height and a municipality could not require a homeowner to cut their grass until the grass got at least 10 inches high. However, as promulgated in 2003, IPMC § 302.4 was altered and lawn height standards have been removed in favor of an open provision allowing local control of lawn height. (Appendix 82b) The 2003 IPMC now provided, in pertinent part:

> **302.4 Weeds.** All premises and exterior property shall be maintained free from weeds or plant growth in excess of (jurisdiction to insert height in inches). (Appendix 82b)

Thus, the drafters of the IPMC recognized through their 2003 revisions that local municipalities may desire to and should be permitted to adopt provisions tailored to the needs of that locality, with regard to property maintenance standards.

Property conditions vary dramatically across the state along with local geographic, demographic, economic and social conditions. With these varying

conditions, there is not a strong argument that a uniform building maintenance code will appropriately address any community's problems much less all communities' problems.

Local priorities vary. To some degree, the varying priorities will depend on local property conditions, but these priorities will also depend on local resources and budgets, competing demands, history, community standards and other valid concerns. Benton Harbor is in a very different situation than is Bloomfield Hills. The same is true of Pontiac and Portage. Even Grand Haven and Spring Lake, which abut one another, have different priorities, resources and political situations. No cogent argument has been made as to why statewide uniformity is needed and local policy-making should be eliminated.

Grand Rapids and other municipalities have taken a variety of approaches to deal with property maintenance problems and concerns. Detroit is demolishing a huge number of properties that are no longer salvageable in order to assemble tracts of land that can be successfully developed. Grand Rapids has taken the approach of aggressively working to maintain existing stock by a strong community-oriented approach to housing and commercial building repair and maintenance.

In some communities, especially the newer and more affluent ones, property repair and maintenance isn't a major concern and it doesn't need to be. In Grand Rapids, a lesser degree of attention had been placed on addressing commercial and industrial properties, as compared to residential properties, until the Building Maintenance Code was recently amended to cover all commercial properties. Many communities have few commercial or industrial properties. Some have significant numbers of them. In those communities where older buildings and factories or

deteriorating downtowns exist, the community may choose to have more stringent standards for commercial and industrial buildings than for residential. That is, and ought to be, a local choice.

The Michigan Supreme Court held in *Stadle v Township of Battle Creek,* 346 Mich 64, 70; 77 NW2d 329 (1956), that:

> The propriety and policy of vesting in municipal organizations certain powers of local regulations, in matters concerning which the parties immediately interested may be more competent to judge than any central authority, is well recognized.

The above holding was subsequently followed in another property related case, *Heath Township v Sall*, 442 Mich 434, 441; 502 NW2d 627 (1993). The Defendants contend that the Court in this case should also adopt the above holding and find the Building Maintenance Code is not preempted.

VII. Conclusion.

Using the standards set out by this Court in *People v Llewellyn, supra*, the City of Grand Rapids Building Maintenance Code is not preempted by the Stille-DeRossett-Hale single state construction code act, MCL 125.1501, *et seq*., as amended by Pub Acts 1999, No. 245

REQUEST FOR RELIEF

WHEREFORE, Defendant-Appellee City of Grand Rapids prays this Honorable Supreme Court affirm the lower courts decisions in this matter and affirm the dismissal of Plaintiff-Appellant's claims.

Respectfully submitted,

THE CITY OF GRAND RAPIDS, *a Michigan municipal corporation,*

Dated: August 3, 2006

By: _____

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